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CORPORATION and Counterdefendant GOLDEN
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

UM CORPORATION, a Japanese
corporation,

Plaintiff,

v.

TSUBURAYA PRODUCTIONS CO.,
LTD., a Japanese corporation,

Defendant.

Case No. 2:15-cv-03764-AB (AJWx)

**MEMORANDUM OF POINTS OF
AUTHORITIES OF PLAINTIFF
AND COUNTERDEFENDANT UM
CORPORATION AND
COUNTERDEFENDANTS GOLDEN
MEDIA GROUP, INC. AND TIGA
ENTERTAINMENT COMPANY,
LTD. IN SUPPORT OF MOTION IN
LIMINE NO. 1 TO EXCLUDE OR
LIMIT EXPERT TESTIMONY OF
LLOYD CUNNINGHAM [Fed. R.
Evid. 702]**

AND RELATED CROSS-CLAIMS

Hearing Date: October 20, 2017
Hearing Time: 11:00 a.m.
Courtroom: 7B

Pretrial Conf.: October 20, 2017
Trial: November 7, 2017

INTRODUCTION

UM Corporation (“UMC”), TIGA Entertainment Company, Limited (“TIGA”), and Golden Media Group, Inc. (“GMG”) respectfully ask the Court to exclude or limit the testimony of Lloyd Cunningham, designated by Tsuburaya Productions Co., Ltd. (“TPC”) to provide expert testimony as to the authenticity of the signature of Noboru Tsuburaya appearing on the March 4, 1976 License Granting Agreement (the “1976 Agreement”).

Mr. Cunningham considered only 29 “known” signatures from Noboru Tsuburaya in reaching his opinion that the signature on the 1976 Agreement – and similar appearing signatures on a 1973 agreement and two photographs – were forgeries because those signatures did not include features found in his 29 “known” signatures. In a Thai lawsuit in 1998, however, TPC employee Kiyotaka (“Jimmy”) Ugawa testified that there were “thousands” of signatures from Noboru Tsuburaya, but that he had provided only a handful of documents to a handwriting examiner engaged to offer expert testimony in that lawsuit.

Because TPC employees in the late 1990s cherry-picked which signatures to provide the handwriting examiner and had every opportunity and motive to discard signatures that contained features that are similar to those of the signature on the 1976 Agreement,¹ Mr. Cunningham lacks “sufficient facts or data” to opine that the signature on the 1976 Agreement is not authentic because it differs from the signature on the 29 documents with which he was provided. Fed. R. Evid. 702(b). Because Mr. Cunningham admitted that his methodology would require him to find that the 1976 Agreement was signed by someone other than the person who signed his “known” Noboru Tsuburaya signatures even if he were provided with 100 signatures like that on the 1976 Agreement (and even if he were provided with

¹ UMC, TIGA, and GMG believe that TPC’s failure to retain the thousands of signatures from Noboru Tsuburaya long pre-dated the filing of this lawsuit; they therefore do not contend that such failure should be treated as a violation of the discovery rules. They have, however, requested a jury instruction on spoliation.

1 a videotape of Noboru Tsuburaya signing a signature in this manner), his testimony
2 is not “the product of reliable principles and methods.” Fed. R. Evid. 702(c). Mr.
3 Cunningham’s testimony should therefore be excluded in its entirety.

4 In the alternative, because Mr. Cunningham’s inability to review thousands
5 of documents with Noboru Tsuburaya’s signature renders his opinions suspect, the
6 Court should limit his testimony by: (1) allowing him to testify only to similarities
7 and differences between his “questioned” and “known” signatures; and (2)
8 precluding him from testifying as to the degree of certainty of his opinions.

9 **BACKGROUND**

10 **A. The 1976 Agreement and TPC’s Failure to Retain Thousands of** 11 **Signatures from Noboru Tsuburaya.**

12 The principal issue at trial will be the authenticity of the 1976 Agreement, a
13 document dated March 4, 1976 bearing the name of TPC President Noboru
14 Tsuburaya and assigning certain rights in Ultraman works to Sompote
15 Saengduenchai (“Sompote”). Exhibit 4A (Ex. A to Declaration of Jeffrey D.
16 Wexler (“Wexler Decl.”)). The parties’ dispute has been litigated in Thailand,
17 Japan, and China, with the first lawsuit filed in 1997. On September 21, 1998,
18 TPC employee Mr. Ugawa testified in the Thai lawsuit that there were thousands
19 of signatures bearing Noboru Tsuburaya’s signature, but that he had picked only
20 about 10 documents bearing signatures to send to a handwriting examiner:

21 . . . I sent the documents for verification. Mostly, I was the
22 person selecting the documents, but there might be other persons
23 helping. Approximately 10 documents were sent, and the signatures
24 were at similar distances. I cannot tell whether Noboru’s signatures in
the documents sent are different. ***Other than Noboru’s signature that
was sent for verification, there are thousands of documents bearing
Noboru’s signatures. . . .***

25 September 21, 1998 (afternoon) testimony of Kiyotaka Ugawa at 4-5 (Ex. B to
26 Wexler Decl.) (emphasis added).

27 During this lawsuit, the parties have produced about 58 documents bearing
28 Noboru Tsuburaya’s signature (13 of which are copyright applications signed on

1 the same day in 1992, 16 years after the date of the 1976 Agreement, and therefore
2 are of limited use to a handwriting examiner). See Wexler Decl., ¶ 4.

3 **B. Mr. Cunningham's Opinions.**

4 In his initial expert report dated March 15, 2017, Mr. Cunningham
5 considered 29 “known” signatures and two “questioned” signatures – on the 1976
6 Agreement and an October 5, 1973 Agreement (the “1973 Agreement”). See
7 March 15, 2017 Expert Report of Lloyd Cunningham at 1-3 (Ex. C to Wexler
8 Decl.); Wexler Decl., Ex. F (Mr. Cunningham’s “known” signatures); *id.*, Ex. A
9 (1976 Agreement); *id.*, Ex. G (1973 Agreement). At deposition, Mr. Cunningham
10 stated that two photographs bearing the signature “Noboru Tsuburaya” were also
11 “questioned” signatures. See Deposition of Lloyd Cunningham (“Cunningham
12 Depo.”) at 133:6 – 134:6, 138:11 – 139:1 (Ex. E to Wexler Decl.); Wexler Decl.,
13 Ex. H (signatures on photographs).

14 Mr. Cunningham concluded “positively” that the signatures on the 1976
15 Agreement and the 1973 Agreement were “not the normal or genuine signature of
16 Noboru Tsuburaya.” Cunningham Depo. at 144:13 – 145:1, 147:18-25. Mr.
17 Cunningham stated that his opinion was intended to refer to the highest standard –
18 “elimination” – included in the SWGDOC Standard Terminology for finding a
19 document to be not authentic, *i.e.*, that there was “no doubt in his opinion that the
20 questioned and known writings were not written by the same individual.” *Id.* at
21 147:3 – 149:6, 149:15-21. Mr. Cunningham also reached an “elimination”
22 conclusion as to the signatures on the photographs. See *id.* at 150:11 – 151:22.

23 Mr. Cunningham acknowledged that “[i]f a client picks and chooses the
24 signatures that are supposed to be known signatures to submit to a forensic
25 document examiner, they can in some cases be very self-serving.” *Id.* at 40:22 –
26 41:20, 43:7-25.

27 Mr. Cunningham explained that in this case he followed his methodology for
28 determining the authenticity of handwriting by examining known signatures to

1 make “a determination as to the range of variation exhibited throughout submitted
2 known signatures,” after which “the side-by-side comparison of the questioned and
3 known signatures is conducted.” *Id.* at 34:11 – 37:2. He testified that it was
4 desirable to have multiple samples of known handwriting because, *inter alia*,
5 “many individuals have what are called formal and informal signatures, and it’s not
6 able [*sic*] to determine from one signature if an individual utilizes formal and
7 informal signatures.” *Id.* at 37:4 – 38:22. He explained that formal signatures are
8 “generally written on important documents,” such as “some type of important
9 contract,” and that autographs written in a book might be formal signatures. *Id.* at
10 37:23 – 39:3. He acknowledged that “[t]here are times when formal signatures
11 versus informal signatures cannot be associated,” *id.* at 38:8-9, also testifying that:

12 Q. Now what happens if, say, you have one formal signature
13 and 20 informal signatures? Isn’t there a risk that you would decide
14 that the formal signature falls outside the normal range of variation
and discard it?

15 A. Well that’s – that’s [*sic*] a situation where if it is so
16 divergently different in the formal versus the informal signature, at
17 that point I would be able to determine there wasn’t an effort made by
an individual to imitate the informal signatures because what I have
here is a more formal style signature.

18 ***But, on the other hand, I don’t have any formal-style known***
19 ***signatures to use as comparison standards and at that point you***
discontinue your examination and you report accordingly to your
client and you reach no conclusion.

20 *Id.* at 77:17 – 78:8 (emphasis added).

21 Mr. Cunningham testified that he found “very similar differences that are not
22 present in the known documents happen to be present” in the 1976 Agreement and
23 the 1973 Agreement which “indicates these may have been imitated by one
24 individual.” *Id.* at 109:19 – 110:6; *see id.* at 106:5-16. He opined that “these
25 questioned signatures . . . all share repeated errors, . . . all share a slow drawing
26 quality, . . . all show features that are not present in any of the known questioned
27 [*sic*] signatures that are all written very spontaneously, very fluently, very normally
28 and were written on similar business documents.” *Id.* at 151:12 – 153:20.

Mr. Cunningham stated that it “ha[d] no bearing on my examination whatsoever” whether there might have been thousands of signatures from Noboru Tsuburaya because “I was satisfied with the 29 known exemplar signatures and they are a fair representation of his normal variation for that time period and . . . on similar business documents.” *Id.* at 150:15 – 151:11. He said that even if he were provided with 100 documents that looked like the signatures that appeared on the 1976 Agreement and the 1973 Agreement and were told that they were known signatures, and even “[i]f there was an unaltered video showing [Noboru Tsuburaya] sign his signature in this manner,” he “would have to put them in two subsets because they just don’t agree with each other.” *Id.* at 106:17 – 108:12.

LEGAL ARGUMENT

I. MR. CUNNINGHAM’S TESTIMONY SHOULD BE EXCLUDED BASED ON THE LACK OF “SUFFICIENT FACTS OR DATA” FOR A FINDING THAT THE 1976 AGREEMENT IS NOT AUTHENTIC.

There is a strong argument that the opinions of handwriting experts never satisfy the requirements set by *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), for admissibility of expert testimony. *See, e.g., Alcemeiga v. Center for Investigative Reporting*, 185 F. Supp. 3d 401, 413-26 (S.D.N.Y. 2016). However, this motion does not ask the Court to hold that handwriting expert testimony never satisfies *Daubert*. Instead, Mr. Cunningham’s opinions should be excluded because, by reason of TPC’s destruction of thousands of Noboru Tsuburaya’s signatures, Mr. Cunningham’s opinions are not “based on sufficient facts or data” and are not “the product of reliable principles and methods.” Fed. R. Evid. 702(b), (c).

Boiled to its essence, Mr. Cunningham’s opinion is that the signatures of Noboru Tsuburaya on the 1976 Agreement, the 1973 Agreement, and the two photographs were signed by a different person than the person who signed Mr. Cunningham’s 29 known signatures because: (1) the former signatures were signed more slowly than the latter signatures; and (2) the former signatures share

1 certain characteristics that Mr. Cunningham did not find on his 29 “known”
2 signatures. Mr. Cunningham’s opinions are predicated on his assumption that his
3 “known” signatures reflect a representative sample of Noboru Tsuburaya’s
4 signatures – an assumption that cannot be tested because TPC destroyed
5 thousands of documents with Noboru Tsuburaya’s signatures and had every
6 incentive and opportunity over the nearly 20 years prior to the filing of this
7 lawsuit to destroy any signatures that resembled the signature on the 1976
8 Agreement.

9 For several reasons, it appears likely that the thousands of destroyed
10 signatures from Noboru Tsuburaya contained evidence tending to prove that the
11 1976 Agreement is authentic. First, Sompote retained three other documents that
12 bear signatures like that appearing on the 1976 Agreement – the 1973 Agreement
13 and the two photographs. See Wexler Decl., Exs. A, G, H. Mr. Cunningham
14 concluded that these three signatures are also forgeries because they bear certain
15 features that he finds in the 1976 Agreement but not his 29 “known” documents.
16 However, a different conclusion is equally consistent with the facts: TPC
17 discarded the signatures in its possession that looked like the signature on the
18 1976 Agreement, but it couldn’t discard such signatures in Sompote’s possession.

19 Second, Mr. Cunningham acknowledged that persons sometimes have
20 formal and informal signatures, that formal signatures might be used for important
21 agreements and autographs in books, and that sometimes it is not possible to
22 “associate” a person’s formal and informal signatures with one another. See
23 Cunningham Depo. at 37:4 – 39:3. The 1976 Agreement and the two photographs
24 fall within the categories of documents that may, according to Mr. Cunningham,
25 bear formal signatures. The documents destroyed by TPC were likely to include
26 other formal signatures.

27 Third, as Mr. Cunningham agreed, an alleged forger of the signature on the
28 1976 Agreement could not have created the signature on that Agreement using the

signatures known to have been in Sompote's possession (all but one of which was signed "N. Tsuburaya") because such signatures did not bear the features claimed to have been copied (*e.g.*, "Noboru"). *See id.* at 117:10 – 125:5. Thus, Mr. Cunningham's opinion that the signature on the 1976 Agreement is copied assumes: (1) Sompote had additional signatures of Noboru Tsuburaya in his possession that more closely resemble the signature on the 1976 Agreement; but (2) Sompote somehow failed to produce those signatures even though they would have helped him prove the authenticity of the signature on the 1976 Agreement.

Fourth, Mr. Cunningham's 29 "known" documents include two distinct styles of signatures by Noboru Tsuburaya from the mid-1970s – a "Noboru Tsuburaya" signature in a more curved cursive and an "N. Tsuburaya" signature in a more angular cursive. *Compare* Wexler Decl., Ex. F, at 109, 115-40 *with id.*, Ex. F, at 110-14. The fact that Noboru Tsuburaya had at least two forms of signature at the time of the 1976 Agreement increases the likelihood that he had a third form of signature, and/or a broad variation in his normal range of signature.

Finally, according to Mr. Ugawa's October 20, 1976 notes [Exhibit 238], Tsuneyuki Morishima, an employee in Tsuburaya's contract drafting department as of March 1976 who was familiar with Noboru Tsuburaya's signature, told Mr. Ugawa that "[t]here is no doubt that . . . the signature penmanship is also the previous president's [Noboru Tsuburaya]." ² Mr. Morishima's unequivocal statement indicates that there must have once been signatures from Noboru Tsuburaya that appear similar to the signature on the 1976 Agreement.

For all of these reasons, the fact that Mr. Cunningham has been provided with only a small subset of the signatures of Noboru Tsuburaya that once existed means that Mr. Cunningham lacks "sufficient facts or data," Fed. R. Evid. 702(b),

² TPC plans to file a motion *in limine* to exclude Mr. Ugawa's notes based upon the attorney-client privilege. However, the notes are at best qualified work product because Mr. Ugawa is a non-attorney; the subsequent transmission of the notes to TPC's counsel could not render them privileged.

1 to render his opinions. In particular, Mr. Cunningham lacked sufficient facts or
2 data to conclude that Noboru Tsuburaya never signed his name slowly, or that the
3 signatures on his “questioned” documents fall outside the standard range of
4 Noboru Tsuburaya’s signatures.

5 Furthermore, Mr. Cunningham’s opinions are not “the product of reliable
6 principles and methods.” Fed. R. Evid. 702(c). Mr. Cunningham acknowledged
7 that it is undesirable for a client to review documents before providing them for
8 analysis, *see* Cunningham Depo. at 40:22 – 41:20, 43:7-25, but his “known”
9 signatures were heavily cherry-picked by TPC. In addition, Mr. Cunningham
10 testified that even if he were provided with 100 known documents with a
11 signature like that appearing on the 1976 Agreement or a videotape of Noboru
12 Tsuburaya signing a signature in that manner, he would still have to put such
13 documents in a different subset than his known signatures. *See id.* at 106:17 –
14 108:12. If Mr. Cunningham’s methodology were reliable, he would be required
15 in such circumstances to conclude either that Noboru Tsuburaya’s signature
16 evidenced a broad range of variation and/or that Noboru Tsuburaya had varying
17 formal and informal signatures. Because Mr. Cunningham’s methodology would
18 not allow (let alone require) him to conclude that the signature on the 1976
19 Agreement was authentic even with undisputed proof of authenticity, such
20 methodology is inherently unreliable.

21 Mr. Cunningham testified that when an expert does not have known formal-
22 style signatures to compare to a questioned formal signature, the expert is to
23 discontinue the examination and report an inability to reach a conclusion. *See id.*
24 at 77:17 – 78:8. Here, Mr. Cunningham found two separate groups of signatures
25 – his 29 “known” signatures and his four “questioned” signatures. Instead of
26 recognizing that Noboru Tsuburaya might have signed important documents like
27 the 1976 Agreement and the photographs more slowly and carefully than his
28 “known” documents, Mr. Cunningham opined that the documents that were

1 signed slowly and carefully must have been signed by someone other than Noboru
2 Tsuburaya. If Mr. Cunningham had applied reliable principles and methods and
3 recognized that TPC had self-selected the signatures to be provided for
4 handwriting examination and that he might not have received formal signatures,
5 he would have reported that the available information was insufficient for him to
6 reach a conclusion (much less a conclusion to the highest degree of certainty).

7 The need to exclude Mr. Cunningham's opinions in their entirety is
8 especially great because of the danger that a jury will defer to the opinions of an
9 expert. *See, e.g., United States v. Hines*, 55 F. Supp. 2d 62, 64 (D. Mass. 1999)
10 ("a certain patina attaches to an expert's testimony unlike any other witness; this
11 is 'science,' a professional's judgment, the jury may think, and give more
12 credence to the testimony than it may deserve"); *United States v. Starzecpyzel*,
13 880 F. Supp. 1027, 1029 (S.D.N.Y. 1995) (jurors are likely to attribute to perceive
14 forensic document examiners as scientists, based in part on "the overly precise
15 manner in which [they] describe their level of confidence in their opinions as to
16 whether questioned writings are genuine").

17 **II. IF ALLOWED, MR. CUNNINGHAM'S TESTIMONY SHOULD BE**
18 **LIMITED.**

19 In the event the Court finds Mr. Cunningham should be allowed to offer any
20 expert opinions notwithstanding his inability to review thousands of documents
21 bearing Noboru Tsuburaya's signature and his lack of reliable methodology, the
22 Court should limit the opinions that he may offer because TPC's destruction of
23 thousands of signatures from Noboru Tsuburaya has deprived Mr. Cunningham of
24 any ability to render an opinion that is in any way conclusive.

25 First, the Court should allow Mr. Cunningham to testify only as to
26 similarities and dissimilarities between "questioned" signatures and the signatures
27 on other documents provided to him, but not as to the ultimate conclusion as to
28 whether the same person signed the 1976 Agreement and his "known" documents.

1 *See U.S. v. Oskowitz*, 294 F. Supp. 2d 379, 383-84 (E.D.N.Y. 2003) (many district
2 courts have “permitted a handwriting expert to analyze a writing sample for the
3 jury without permitting the expert to offer an opinion on the ultimate question of
4 authorship,” leaving for the jury “the ultimate question of authorship”).

5 Second, if Mr. Cunningham is allowed to offer any conclusions as to
6 handwriting identification, he should be precluded from testifying as to his degree
7 of certainty. The nine-level scale used by Mr. Cunningham in rendering his
8 “elimination” opinion is inherently subjective and unreliable. *See U.S. v.*
9 *Rutherford*, 104 F. Supp. 2d 1190, 1193-94 (D. Neb. 2000) (precluding
10 handwriting examiner “from testifying to the degree of probability, confidence, or
11 certainty underlying his proffered opinions” under nine-level scale) (citing
12 *Starzecpyzel*, 880 F. Supp. at 1049-50). In this case, where Mr. Cunningham’s
13 opinions rest upon an untested and untestable assumption that nothing in the
14 thousands of Noboru Tsuburaya signatures that he has not seen could change his
15 analysis, it would be especially inappropriate to allow him to testify to his opinions
16 to any degree of certainty, let alone to the highest possible degree of certainty.

17 **CONCLUSION**

18 For the reasons stated herein, UMC, TIGA, and GMG respectfully ask the
19 Court to exclude or limit Lloyd Cunningham’s testimony.

20 Dated: September 22, 2017

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